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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 395

PERSONAL FINANCE COMPANY OF KENTUCKY,
Petitioner,

vs.

RUFUS HAROLD HADDEN.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

JACKSON R. COLLINS,
Counsel for Petitioner.

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No. 395

PERSONAL FINANCE COMPANY OF KENTUCKY (INCORPORATED),

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vs.

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

MAY IT PLEASE THE COURT:

The petitioner, Personal Finance Company of Kentucky (Incorporated), by its attorney, Jackson R. Collins, respectfully shows to this Honorable Court:

A.

Summary Statement of the Matter Involved.

The issue is whether a Bankruptcy Court in disposing of a bankruptcy of a poor man—a laborer—will fully dispose of the normal, natural questions existing between an

unfortunate debtor and an injured creditor where the creditor believes its debt is not discharged under the approved form of discharge order, Form 45, set forth in General Orders and Forms in Bankruptcy or whether a second lawsuit must be instituted in another court in order to learn the effect of the order that has been or may be granted. It is believed that such a refusal of the Referee-in-Bankruptcy to entertain such an issue is a travesty upon the administration of justice where speed, dispatch and quick final determination is most needed, also that such refusal to entertain the issue is a denial of "equality before the law" and a dereliction in the duty of the Bankruptcy Court to fully administer the Bankruptcy law.

The facts of this case are that on the 28th day of August, 1940, the respondent herein obtained a loan of money from the petitioner herein in the amount of $268.00 which was evidenced by a promissory note.

As a basis for obtaining the loan the respondent executed and delivered to petitioner a statement in writing concerning his financial condition. In that statement dated August 8, 1940, he set out his monthly earnings as $125.00, that he owned $200.00 worth of household furniture and only owed $96.00.

Thereafter he went bankrupt and in his schedule of debts filed November 10, 1942, he disclosed he owed on August 28, 1940, not one debt but a number of debts still unpaid in an amount of $258.15 and the one debt reported was reduced from $96.00 to $59.44 and a total of $802.79 owed as of the date of the filing of his schedules which is six times more than his monthly earnings.

The relation of earnings to total of debts goes to the roots of materiality of the falseness or misrepresentation as well as the number and nature of the debts. The credit granting rule of the petitioner herein is that total debts

after the loan is made shall not exceed three times monthly earnings and there shall be appropriate budget arrangements.

The petitioner herein after a study of the schedules in bankruptcy and examination and attendance at the first meeting of creditors was of the opinion that the debt of this bankrupt-borrower was within the exception of Section 17 of the Bankruptcy statute 11 U. S. C. A. § 35 and would not be subject to an order of discharge that followed Form 45 provided in the General Orders.

The matter was before no other court and the issue was presented at the last opportunity offered to creditors before an order of discharge was granted; i.e., the last day to file specifications of objections to discharge according to notice of the Referee-in-Bankruptcy.

The Referee-in-Bankruptcy refused to entertain the petition of the creditor to declare this particular debt within the exception of Section 17 of the Bankruptcy Act stating after an exhaustive opinion that "This court is clearly not the forum for a trial of an issue of this character."

The District Judge dismissed a petition to review and the United States Circuit Court of Appeals for the Sixth Circuit affirmed the order of the District Court after assuming, however, that it was within the jurisdiction of the lower court to entertain such a petition.

After a discussion of legal principles the Circuit Court said: "There are no unusual circumstances here to distinguish appellant's case from the *Ellithorpe* case and we find no reason to disregard the general rule that in the interest of harmonious and efficient administration of the law we should accept the *Ellithorpe* case as correct."

The court also observed that there were other remedies. But the petitioner herein did not wish the hard and harsh remedy of objection to discharge, instead it sought the

more appropriate remedy provided by Section 17, nor did it wish to start a new proceeding in an appropriate State court but sought a simple direct petition before the Bankruptcy Court for a final determination of its rights upon the debt as it might be affected by the Bankruptcy proceeding in which both the debtor and creditor were parties and alike interested.

B.

Statement of Jurisdiction.

1. The statutory provision believed to be the basis upon which this Court has jurisdiction upon appeal to review the judgment in question is Section 240 of the Judicial Code, 28 U. S. C. A. § 347.

2. The judgment sought to be reviewed was decided June 2, 1944.

3. The proceeding in which review is sought originated in the United States District Court for the Eastern District of Kentucky on a voluntary petition in bankruptcy filed by the respondent on the 10th day of November, 1942. The nature of the case involves the issue whether the Bankruptcy Court should fully dispose of questions relating to the effect of its decree discharging a bankrupt where such questions arise during the bankruptcy proceedings through a petition of a creditor to have its particular debt declared beyond the scope of any order of discharge that might be granted by authority of Section 17, subsection (2) of the Bankruptcy Act. The Referee-in-Bankruptcy denied the petition of the creditor, the District Court dismissed the petition to review and the United States Circuit Court of Appeals for the Sixth Circuit affirmed the order of the District Court on the ground there were "no unusual circumstances."

C.

The Questions Presented.

1. What is the duty of the Bankruptcy Court (the Referee) to pass, in the first instance, upon an application to have a particular obligation of the Bankrupt declared without the scope of any discharge that might be granted.

2. When the Bankruptcy Court is the only court having the question before it, should it pass upon an original application for a ruling as to whether a particular debt is within the scope of the discharge, i. e., within one of the exceptions of Section 17 of the Bankruptcy Act.

3. Whether the Bankruptcy Act should not be administered to render justice speedily, cheaply and completely.

D.

Reasons Relied on for the Allowance of the Writ.

1. The Decision of the Circuit Court of Appeals is in Conflict with the *Hunt* Case.

The Circuit Court of Appeals in its opinion deciding this case cited the decision of this court in *Local Loan Co.* v. *Hunt* (1934) 292 U. S. 234 and dwelt at some length on the holding of this court in that case. The gist of their discussion is that under the doctrine of the *Hunt* case the Bankruptcy Court has broad equity powers including the power to determine the effect of its own adjudication, but that such powers are discretionary and will not be exercised "except under unusual circumstances." The effect therefore is that under the construction of the *Hunt* case by the Circuit Court a bankrupt will be granted his discharge by the usual broad decree but "except under unusual circumstances" neither he nor any creditor is entitled, usually, to

know the scope and effect of the discharge. Thus the bankrupt is put to the trouble, time and expense of defending himself in separate state court actions which may be instituted by one or more creditors to learn the scope and effect of the Federal Decree.

The Circuit Court recognized and stated that the facts of the *Hunt* case and of the instant case were fundamentally different but nevertheless pulled from the *Hunt* case the "under unusual circumstances" language and based its holdings in the instant case on that language.

This same position has been taken recently by two other circuit courts when the question was presented to them for review:

Watts, et al. v. *Ellithorpe, Bankrupt* (1943) 135 Fed. (2d) 1 (CCA-1);

Globe Family Finance Co. v. *Barber, Bankrupt* (1944) 140 Fed. (2d) 727 (CCA-3).

The petitioner herein is advised by counsel that the view of the Circuit Court in the instant case is probably in conflict with and a misconstruction of the language of the *Hunt* case, firstly because the language used by this court in that case was intended to apply only where concurrent jurisdiction of Federal and state courts occur and the rule of comity comes into play and is not in point here where no state court was involved and the Bankruptcy Court had exclusive jurisdiction; secondly because the fundamental base upon which the Hunt decision was made was a recognition of the inadequacy of resort to state court action and a recognition that "One of the primary purposes of the bankruptcy act is to 'relieve the honest debtor from the weight of oppressive indebtedness and permit him to start afresh free from the obligations and responsibilities consequent upon business misfortunes'."

2. The Question Involved Has Not Been But Should Be Settled By This Court.

The petitioner herein is also advised by counsel that since the *Hunt* case is not in point and since the language of this court in that case is believed to have been erroneously applied to the instant case by the Circuit Court there is here involved an important question of federal law which has not been, but should be, settled by this court.

A fundamental part of the administration of justice under the Bankruptcy Act is neglected by the equity court when it grants to a bankrupt a discharge but requires him and the injured creditors to resort to separate state court actions in order to find out the effect of the order of discharge and whether a particular debt is within the scope of the discharge granted. Thus, the unfortunate debtor is forced to undergo de novo a series of trials to learn the effect of his discharge while throughout the bankruptcy proceedings the Referee, who is supposed to know the bankruptcy law has become familiar with the facts and is in the best position to judge the merits of a bankrupt's case and the merits of particular creditors who claim their debts are not dischargeable in bankruptcy.

No unfortunate debtor and no creditor who believes he has a just cause can believe there is justice rendered in the American way when a Referee-in-Bankruptcy in an unfettered exercise of his "discretion" rules that his court is not the forum for deciding the extent or effect of a decree discharging a bankrupt and makes it necessary for the parties to go and start anew in another court to determine the extent of the decree of the Bankruptcy Court.

This is regrettable for those few who can afford the expense of duplicity of suits, but for the more numerous poor persons for whose benefit the Bankruptcy Act was enacted, it is often a denial of their right to equality before the law which is the foundation of our democracy.

Judge Wiley Rutledge in speaking before the Committee on Legal Aid Work at the annual meeting of the American Bar Association, September 1941, said in part:

> "The first and to my mind the most important is that equal justice, equality before the law, in a true democracy is a matter of right. It cannot be a matter of charity or of favor or of grace or of discretion * * *.
>
> "And of course, at the bottom of the ladder is the poor person who can't pay anything; not the average citizen, but the person, nevertheless, who is a member of our society and entitled to receive the basic protections of its citizenship. * * * yet, the general operation, the practical working of our system is to exclude that person as well as the average citizen, from actual and direct participation in the benefits of our system of justice."

3. There Is a Conflict of Principles in the Administration of the Bankruptcy Act.

The position of the Circuit Court in this case to the effect that the creditor is not without an adequate remedy at law by means of another action in the appropriate state court is at variance with the principles expressed in *Seaboard Small Loan Corporation* v. *Ottinger* (1931) 50 Fed. (2d) 856 (CCA-4) where the court held that there was no adequate remedy at law for a bankrupt who is required to litigate in the state courts, after his discharge in bankruptcy, to learn the scope and effect of the Federal decree. This position of the court in the *Ottinger* case was later cited with approval by this court in the *Hunt* case at page 242.

The *Ottinger* and *Hunt* cases involve intervention by the federal court on the petition of a debtor who had already been adjudicated a bankrupt and received his discharge and another action had been begun by a creditor in the state court.

The Circuit Court in this case also took the position that

the creditor had an adequate remedy by virtue of Section 14 of the Bankruptcy Act in that it might have objected to the bankrupt's discharge before it was granted. The realities of this type of harsh remedy when it is exercised by the creditor in individual cases is apparently ignored by the Circuit Court. Yet the referees in bankruptcy who are closer to the firing line and who see the results of the use of Section 14 have, in many instances, expressed a human dislike to this remedy because of the fact that it results in an utter failure of the Bankruptcy Act to give the needed relief.

Perhaps no better example of this can be given than that contained in the findings of fact and conclusions of the referee in bankruptcy in *Matter of Joseph Frank Pelz, Bankrupt* (1941) 48 Am. B. R. (N.S.) 786, affirmed by the District Court in 22 Ohio Opinions 429. In this case where a creditor filed objections to the bankrupt's discharge under Section 14 of the Bankruptcy Act, and the discharge was denied, the referee stated:

> "I need hardly say again how I regard this ground of objection in the Bankruptcy Act. It seems to me to penalize a bankrupt, who makes one error in conduct in regard to one creditor whose claim is admittedly not dischargeable (see section 17) by denying him a discharge from all of his debts, of which the particular claim is a very small percentage. If he had deserted his wife and children and owed for their support, or had embezzled millions, such claims would not be dischargeable either, but they would *not* be grounds of objection to a discharge generally.
>
> "In this case for example the bankrupt is in a pitiful condition financially. He is over-burdened with debt through no fault of his own. His wife's illness primarily and his own, has sunk him in debt. If not discharged from them, he has no means and no earning power to pay them all; that is apparent.
>
> "He borrowed $300 from this objecting creditor of which all but a few dollars paid other loan companies.

"Yet this ground of objection is in the Act and under the facts in this case, I feel constrained to deny the discharge. The decisions of the courts, especially in recent years, leave no escape as I see it."

This case and the above language have recently been reported and commented on in the Journal of the National Association of Referees in Bankruptcy, Vol. 18, July 1944 wherein Referee William B. Woods of Cleveland, Ohio, discusses developments in bankruptcy law and supplements a more detailed development of this subject contained in the Journal, Vol. 18, April 1944. The *Pelz* case was discussed in connection with a report of the committee appointed by the Judicial Conference of Senior U. S. Circuit Judges which favors a change in the Bankruptcy Act permitting conditional discharges in order to avoid hardships under Section 14 of the Act.

There are also cases dealing with applications by bankrupts to stay state court actions during the pendency of the bankruptcy proceedings. These cases hold that the question whether the action is within the scope of one of the exceptions of Section 17 will be determined by the Bankruptcy Court and a stay of the state court proceedings will be granted or denied accordingly.

Personal Finance Company of Colorado v. *Alexander Martinez*, (1940) 115 Fed. (2d) 226 (CCA-10).

Beneficial Loan Company v. *Ralph Royce Noble*, (1942) 129 Fed. (2d) 425 (CCA-10).

Stephen W. Alvino, Bankrupt, (1940) 111 Fed. (2d) 642 (CCA-2).

Also there are many lower court judges who believe so thoroughly that the Bankruptcy Act gives full and complete relief that they refuse or delay in taking jurisdiction of actions affecting the scope of a bankrupt's discharge (see *Personal Finance Co. of Louisiana* v. *Thomas*, (1936) 167 So. 475.

The petitioner herein is advised by counsel that the principle of when there is an adequate remedy at law is a matter of conflict between the circuit courts; that to require the creditor to pursue his remedy in the state court involves additional trouble, embarrassment, and expense to the bankrupt and creditor alike; that the failure, as in the instant case, to accord to the injured creditor the same standards of avoidance of disproportionate trouble, embarrassment, and expense as laid down in the *Ottinger* and *Hunt* cases is a violation of the mandate contained in Article I, Section VIII of the Federal Constitution by which the Congress is required to establish "uniform laws on the subject of bankruptcies throughout the United States"; and that the alternative remedy of having a creditor proceed under Section 14 of the Bankruptcy Act is unnecessarily harsh and injurious to the bankrupt and causes the Act to fail in its primary purpose of giving the bankrupt a fresh start.

Wherefore, petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the Sixth Circuit, demanding that Court to certify and send to this Court, for its review and determination on a day certain therein to be named, a full and complete transcript of the record and all proceedings in this case numbered and entitled on its docket "No. 9684, In the Matter of Rufus Harold Hadden, Bankrupt, Personal Finance Company v. Rufus Harold Hadden" and that said judgment of the United States Circuit Court of Appeals for the Sixth Circuit may be reviewed by this Honorable Court, and that this petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

JACKSON R. COLLINS,
Counsel for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

I.

The Opinions of the Courts Below.

The opinion of the United States Circuit Court of Appeals for the Sixth Circuit was rendered on June 2, 1944. It is reported in 142 Fed. (2d) 896 and is to be found on page 40 of the record herein.

The memorandum opinion of the District Court was rendered June 29, 1943. It is not reported.

II.

Jurisdiction.

A full statement of the grounds on which the jurisdiction of this court is invoked has been given under heading "B" in the petition and in the interest of brevity is not repeated here.

III.

Statement of the Case.

A full statement of the case has been given under heading "A" in the petition and in the interest of brevity is not repeated here.

IV.

Specification of Errors.

The United States Circuit Court of Appeals for the Sixth Circuit erred in the following respects:

1. In holding that, where, as in this case, the Bankruptcy Court was the only court having the question before it, there was no abuse of discretion in refusing to pass upon

an application for a ruling as to whether a particular debt is within the scope of the discharge; i.e., within one of the exceptions of Section 17 of the Bankruptcy Act.

2. In holding that unusual circumstances must exist before the Referee-in-Bankruptcy has authority to pass upon an application for a ruling as to whether a particular debt is within one of the exceptions of Section 17 of the Bankruptcy Act.

3. In refusing to fully administer the Bankruptcy Act, thus defeating the intention of Congress.

4. By compelling other than Bankruptcy courts to participate in administering the Bankruptcy Act.

V.

Argument.

Point I.

It was the duty of the Bankruptcy Court (the Referee) in this case to pass upon the application of this creditor to have its obligation declared within one of the exceptions of Section 17 of the Bankruptcy Act.

Beyond question, a Referee sitting in a Bankruptcy Court has the power to determine the scope of a discharge in bankruptcy. This power can be exercised before, at the time of, or after the date of the discharge.

The power is spelled out in Section 2 of the Chandler Act (11 U. S. C. A. sec. 11) reading as follows:

> "(a) The courts of the United States hereinbefore defined as courts of bankruptcy are hereby created courts of bankruptcy and are hereby invested, within their respective territorial limits as now established or as they may be hereafter changed, with such jurisdiction at law and in equity as will enable them to

exercise original jurisdiction in proceedings under this title, * * * to * * * (15) Make such orders, issue such process, and enter such judgments, in addition to those specifically provided for, as may be necessary for the enforcement of the provisions of this title * * * (b) Nothing in this section contained shall be construed to deprive a court of bankruptcy of any power it would possess were certain specific powers not herein enumerated."

That the Referee has such power is also amply supported by the following authorities:

Pepper v. *Litton*, (1939) 308 U. S. 295.
Local Loan Company v. *Hunt*, (1934) 292 U. S. 234.
Seaboard Small Loan Corporation v. *Ottinger*, (1931) 50 Fed. (2d) 856.
Holmes v. *Rowe*, (1938) 97 Fed. (2d) 537 (CCA-9).
Hisey v. *Lewis-Gale Hospital*, (1939) 27 Fed. Supp. 20.

In *Pepper* v. *Litton*, supra, this Court said beginning at page 304:

> "The bankruptcy courts have exercised these equitable powers in passing on a wide range of problems arising out of the administration of bankrupt estates. They have been invoked to the end that fraud will not prevail, that substance will not give way to form, that technical considerations will not prevent substantial justice from being done."

In *Simms* v. *Jamison*, (1933) 67 Fed. (2d) 409 (CCA-9), the Court was considering the effect of the discharge in bankruptcy upon a debt secured by chattel mortgages and said, at page 410:

> "The question may be decided by either state or federal court according to state law, but the bankruptcy court has primary and superior jurisdiction to determine the effect of its own decree of discharge, and it may exercise, or refuse to exercise, that jurisdiction according to the exigencies of the case."

The Referee therefore had the primary power and duty to pass upon the original application before him, for a ruling as to whether the particular debt would be within the scope of the dicharge, i. e., within one of the exceptions of Section 17 of the Bankruptcy Act (11 U. S. C. A. § 35). Can a court, having the primary power and duty to do so, refuse jurisdiction as a matter of discretion? For example, in some jurisdictions a court of equity may, in its discretion, refuse to enforce a bill for specific performance. Does this discretion permit a court of equity to say, simply, that it doesn't feel like entertaining such a bill at any time?

Under the Chandler Act, Referees-in-Bankruptcy are designated as "a Court" and the responsibilities and prestige thereby given to them should naturally be willingly assumed. To decide these not too frequent applications may consume some little time, but that, in itself, can be no deterrent to a Court which is charged with the administration of the Bankruptcy Act, when it has the power to exercise jurisdiction and when, since it follows equitable principles, it has jurisdiction.

No one can dispute the fact that there is a remedy for a defrauded creditor by opposing the entire discharge of the bankrupt under Section 14 of the Act (11 U. S. C. A. § 32) nor that there is a remedy available to him by separate suit in the State Courts but these alternative remedies are costly, cumbersome, lengthy and litigious and therefore inadequate remedies for the bankrupt and the creditor alike. These factors were well recognized in *Seaboard Small Loan Corp.* v. *Ottinger* (1931) 50 Fed. (2d) 856 (CCA-4) where the court in passing on an application by a bankrupt to stay, after his discharge, an attempt to enforce in a state court an assignment of future wages, said on page 859 of the decision:

> "It will not do to say that the bankrupt has an adequate remedy at law by pleading the discharge in case of suit, or by suing an employer if the latter withholds

wages under an order such as that here. Such remedy is not adequate, because its assertion involves trouble, embarrassment, expense and possible loss of employment."

Yet it has already proved to be the practice of Referees in numerous instances arbitrarily to refuse to assume jurisdiction by "the exercise of discretion" where the issue is fairly and adequately presented during the bankruptcy proceeding. Such unbounded exercise of discretion is a contradiction of the usual powers exercised by an equity court and results in defeating the primary purpose of the Act in denying to a bankrupt his right to know then and there, without further litigation, the scope and effect of his discharge.

Point II.

The Bankruptcy Court, when it is the only court having the question before it, should pass upon an original application for a ruling whether a particular debt is within the scope of the discharge, i. e., within one of the exceptions of Section 17 of the Bankruptcy Act.

The undisputed rule of the Federal courts that have passed upon whether an action can be brought in a state court during the bankruptcy proceedings is that such action may be brought when the cause of action disclosed in the original complaint filed in the state court falls within one of the exceptions of Section 17 of the Bankruptcy Act. *Stephen W. Alvino, Bankrupt* (1940) 111 Fed. (2d) 642 (CCA-2), *Personal Finance Company of Colorado* v. *Alexander Martinez* (1940) 115 Fed. (2d) 226 (CCA-10), *Beneficial Loan Company* v. *Ralph Royce Noble* (1942) 129 Fed. (2d) 425 (C. C. A.-10).

In the instant case, the question is not raised for the first time in the State court; in fact, it has not been raised

there at all, but is raised only between this bankrupt-debtor and this creditor for the first time in the bankruptcy proceedings initiated by the bankrupt, himself.

The authorities just quoted establish the rule that this question cannot be delayed by the Referee-in-Bankruptcy until after the discharge in bankruptcy, but can be initiated immediately, if the creditor so chooses, in the State court during the pendency of the bankruptcy proceedings.

Incidentally, it is to be noted that in the cases cited dealing with applications by bankrupts to stay State court actions, the question of whether the action is within the scope of one of the exceptions of Section 17 is determined by the Bankruptcy Court. Why, if the dischargeability of a debt is then determined, should it not likewise be determined when the application is by the creditor? Is there any reason why the creditor should be refused a hearing when he has applied for it in the first instance to the Bankruptcy Court having sole jurisdiction of the entire case and being the most skilled court to whom the determination of the problem might be presented.

It seems fitting and proper that the Bankruptcy Court should exercise its jurisdiction as readily, if not more readily, when questions involving the Bankruptcy Act are presented originally to it than when they are presented after an action in a State court.

This seems essential if bankruptcy questions are to be encouraged for presentation in the Bankruptcy Court rather than in State courts and if there is to be a uniformity and an equality of treatment for all those who are subject to the Court's jurisdiction.

We know of no case law in any Circuit with the exception of the instant case and the cases of *Watts, et al.* v. *Ellithorpe* (1943) 135 Fed. (2d) 1 (CCA-1) and *Globe Family Finance Co.* v. *Barber* (1944) 140 Fed. (2d) 727 (CCA-3) which have passed on the precise point here involved.

All of these cases, however, have dwelt at length on the decision of this court in *Local Loan Co.* v. *Hunt* (1934) 292 U. S. 234 and the particular words used by Mr. Justice Sutherland at page 241 of his opinion:

> "It does not follow, however, that the court was bound to exercise its authority. And it probably would not and should not have done so except under unusual circumstances such as here exist."

In the opinion of the Circuit Courts in the instant case as well as the opinions of the *Ellithorpe* and *Barber* cases, supra, it was recognized that the decision of this Court in the *Hunt* case, supra, was not in point. However, each of the opinions of the Circuit Courts have referred to the language "under unusual circumstances" contained in the *Hunt* case, supra, and have construed this language as authority by this Court for the proposition that "unusual circumstances" must be shown to exist before a Bankruptcy Court, in the exercise of its power and discretion, can or should assume jurisdiction of a creditor's petition to have its particular debt declared within the exceptions contained in Section 17 of the Act.

This proposition we believe is in conflict with the holding of the court in the *Hunt* case, supra, and is a misconstruction of its language and intendment.

In our opinion the language "except under unusual circumstances" was intended by this Court to apply to the situation before this Court in the *Hunt* case where the jurisdiction of the State court had been invoked and the intervention of the Federal court was sought by the bankrupt for the purpose of enjoining further State court action. Quite naturally this Court upheld the power of the Federal court to intervene in the State court action, but, in recognition of the rule of comity between State and Federal Courts, laid down the standard that the Federal courts

should not intervene where an issue is before a State court "except under unusual circumstances."

It will readily be seen therefore that the facts of the *Hunt* case were entirely different from those of the instant case where no State court was involved and the Federal court had exclusive jurisdiction.

Furthermore, the Circuit Court in the instant case appears to have overlooked entirely the fact that this Court in the *Hunt* case cited with approval the views of Judge Parker in *Seaboard Small Loan Corp.* v. *Ottinger, supra,* with respect to the inadequacy of State court action. This Court said at page 242 that "such a remedy is entirely inadequate because of the disproportionate trouble, embarrassment, expense, and possible loss of employment which it involves."

This Court also pointed out in the *Hunt* case, as support to the assumption of jurisdiction by the Federal court in that case, page 244: "One of the primary purposes of the Bankruptcy Act is to 'relieve the honest debtor from the weight of oppressive indebtedness and permit him to start afresh free from the obligations and responsibilities consequent upon business misfortune.' "

It is precisely these two standards of inadequacy of a remedy at law by a second action in a State court and the desirability of giving the bankrupt a start afresh which we believe is denied to creditor and bankrupt alike by the decision of the Circuit Court in the instant case. It is precisely these standards that are sought by the petitioner herein to be applied to the instant case and to that extent it is contended that the *Hunt* case is of significance to and has a bearing on the merits of the instant case.

We believe this Court has not passed on, or indicated its position on the point here involved aside from what has just been said here with respect to the *Hunt* case. We do not

say that in every case the Bankruptcy Court must assume jurisdiction of a creditor's petition. We do say that where, as in this case, the Bankruptcy Court is the only court having the question before it, where the record before the Referee shows on its face that a debt is within the exceptions contained in Section 17 of the Bankruptcy Act and hence not dischargeable, and where the bankrupt has not come forward to contravert the record (see *The Morris Plan Industrial Bank of New York* v. *Allen Russell Parker, Jr.*, decided June 30, 1944, U. S. Court of Appeals, D. C., Docket No. 8692, not yet reported), then it is an abuse of the discretion of the Referee to refuse to pass on the creditor's petition. In other words "except under unusual circumstances" the Referee should be required to pass upon such a creditor's petition and it is an abuse of his power of discretion to refuse to do so.

Point III.

The Bankruptcy Act should be administered to render justice speedily, cheaply, fairly, and completely.

There are many advantages in having the question of the discharge of a given debt determined by the Referee rather than by a second suit instituted de novo in a State court by the defrauded creditor before or after the discharge of the bankrupt. Certainly from the point of view of the unfortunate individual who must go to the Bankruptcy Court for relief, it is most expeditious and most beneficial to have his whole problem settled once and for all in one court. After all, the bankrupt has chosen the forum of the Bankruptcy Court to pass upon his financial position. Surely he cannot complain if that court likewise passes upon the question of whether one particular claim was or was not incurred by false pretenses or false representations. If the Bankruptcy Court refuses to pass upon

his claim, his discharge in bankruptcy still leaves him subject to a suit in a state court by the defrauded creditor and he must submit to all the expense and embarrassment inherent in such a suit or suits.

A determination of the whole issue when raised in the Bankruptcy Court secures for the bankrupt, in most cases, the benefit of the services of his attorney already retained by him to handle his bankruptcy and further secures for him the advantage of having his matter heard by a Bankruptcy Referee thoroughly versed and trained in the peculiar problems of bankruptcy.

Under the General Orders of this Court governing bankruptcy, the Referee-in-Bankruptcy is thoroughly familiar with the facts of a particular case, as well as the law applicable thereto. He has obtained his facts from a study of the schedules filed in the bankruptcy proceeding during his verification and checking of them for compliance. He has learned the character and surrounding circumstances of the bankrupt from the examinations conducted before him during the first meeting of creditors and at other times. He has learned certain fundamentals regarding the creditors from their conduct at the first meeting where, under the Bankruptcy Act, he has most probably asked them questions when doubts arose in his mind. He is thoroughly familiar with many of the practices of both debtor and creditor. There is no one in his territory who is in anywise equally versed in the facts and in the law applicable to the problems presented in such a case. This issue was presented *after* these facts had been established, in accordance with the procedure provided in both the Bankruptcy Act itself and the General Orders of this Court.

To compel either the unfortunate debtor or the creditor with an account of doubtful collectibility to start from the beginning, both in allegations and in establishing facts in support thereof or in defense therefrom, is to deny the ideal

of justice for the very persons for whose protection the State and its function primarily exists. The unfortunate debtor is economically weak or he would not be in the Bankruptcy Court. He is generally in dire need of funds and time and must rely upon his labor to keep body and soul together. He has no time to attend other courts and to await his call upon the calendar, nor has he funds to employ lawyers or another lawyer to represent him and to protect his rights, if any, established by the Bankruptcy Act itself. The whole procedure here contended for is designed to accomplish the ideal of justice so that it may be rendered speedily, cheaply, fairly, and completely in the genuine disputes that may exist between debtor and creditor and it is in the forum that has been selected by the debtor himself.

If the question of the dischargeability of a certain debt is decided in the bankrupt's favor, he need be no longer concerned about the matter since it has become *res adjudicata*. Nor is the creditor required to institute further proceedings to establish his right in a strange court.

Of course, the creditor has, admittedly, the other alternative of contesting the bankrupt's right to a general discharge. Thus, because perhaps one creditor out of fifty has been defrauded, that one creditor could prevent the bankrupt's discharge from the other forty-nine debts he has honestly incurred. Certainly, a bankrupt has little complaint if the creditor chooses the more humane course, of asking the Bankruptcy Referee to deal only with the one claim and rule on its dischargeability alone and the Bankruptcy Act is itself better served where the other forty-nine creditors are prevented from getting a windfall.

Bankruptcy courts are not going to be unduly burdened by a number of these applications. They are not too frequent since the circumstances giving rise to them do not often occur for obviously if they did, finance companies,

banks, etc. could not safely make loans. The schedules and all the other papers in a given bankruptcy are all before the Referee and the knowledge which he has of the bankruptcy can be used advantageously by him in the determination of the question. A State court judge is at a handicap for he must often decide these questions without the benefit of as full and complete a knowledge of the bankruptcy law as is possessed by the Referee and he is always without such particular knowledge of the affairs of the bankrupt as is available to the Referee. The actual trial before a Referee is a simple procedure both from his point of view and from that of the parties involved. The questions which arise fall into familiar and easily solved factual patterns. The trial of such an issue in a State court requires elaborate preparations to secure the attendance, perhaps of other creditors to prove when their debts were incurred and to secure in all cases the records of the U. S. District Court as to the original schedules, etc. filed by the bankrupt.

What of the creditor who, after all, is the one who has been defrauded? Such a creditor must, in all cases, participate to some extent in the bankruptcy, at the very least investigating to determine what the assets and liabilities are and what dividend, if any, he may anticipate. The schedules filed by the bankrupt demonstrate the debts were incurred before the financial statement was given; at the first meeting of creditors the financial statement has generally been identified and a full examination had as to the discrepancy between the schedules and the statement. Thus, the factual proof in this regard is already more or less completely in hand.

In re Finn, 119 Fed. (2d) 656, an opinion written by Judge Biggs in the Third Circuit, illustrates the type of fraud committed by a bankrupt against a finance company and the court in that case reversed the District Court and the Referee for granting a bankrupt's discharge. From

that decision it appears how simple was the hearing before the Referee. But the bankrupt there, for one slip in dealing with a finance company, was denied a discharge of all his claims. Would it not have been much more beneficial to him and, for that matter, to his creditor, if the creditor there had sought and been allowed an adjudication of the non-dischargeability of the one particular debt correcting the particular wrong done to the one creditor that was injured by the particular wrong?

The remedy of seeking to have the non-dischargeability of one debt determined is not new. In the case of *Hisey* v. *Lewis-Gale Hospital* (1939) 27 Fed. Supp. 20, page 25, the Court said:

> "Section 17 of the Act having provided what debts are and what are not dischargeable, it follows that a court of bankruptcy, under its duty and power to interpret and administer the provisions of the bankruptcy act, has the power to determine whether a particular debt is dischargeable (Gleason v. Thaw supra); and it would seem to follow that when ready opportunity offers for such determination in a pending bankruptcy proceeding, the question should not be transferred for determination to a state court."
>
> (Compare with the order of Judge Atwell in *In re Weitzman* (1923) 11 Fed. (2d) 897.)

The Courts or Referees have taken jurisdiction and passed on the merits of an application to have a debt declared non-dischargeable in the following matters, and the list here given is by no means all-inclusive:

Roy Armstrong, Bankrupt, No. 9847, Referee Louis R. Gates, First Division, Kansas, June 27, 1941.

Floyd C. Bartow, Bankrupt, No. 40236, Referee Charles Wells Brown, Eastern District of New York, July 22, 1941.

Lilly A. Blades, Bankrupt, No. 120, Hon. Maurice P. Ellison, District Court of United States, Northern

District of Oklahoma, Southern Division, December 4, 1942.

Walter A. Blasing, Bankrupt, No. 29823, Referee Jacob L. TenEyck, Northern District of New York, June 24, 1941.

John C. Ellse, Bankrupt, Referee T. L. Gaskill, District Court of the United States for the District of New Jersey, February 10, 1941.

Chester Andrew Feig, Bankrupt, No. 10417, Hon. A. H. Aston, District Court of United States, Middle District of Pennsylvania, at Wilkes-Barre, January 9, 1943.

Placido B. Franco, Bankrupt, No. 9671, Judge Richard J. Hopkins, U. S. District Court for the District of Kansas, First Division, September 26, 1941; the court entered its decree declaring the debt to be non-dischargeable.

Robert H. Gaffney, Bankrupt, No. 37213-M, Referee Ernest R. Utley, Southern District, Central Division, California, February 27, 1941.

Euclid Garry, Bankrupt, No. 56217, Referee Daniel W. Lincoln, District Court of the United States for the District of Massachusetts, North Oxford, June 6, 1941.

Arthur LeRoy Gatchell, Bankrupt, No. 246, Referee R. C. Northcutt, District Court of United States, Eastern District of Kentucky, October 19, 1942.

George P. Haslam, Bankrupt, No. 222, Referee R. C. Northcutt, District Court of United States, Eastern District of Kentucky, December 27, 1941.

Hisey v. *Lewis-Gale Hospital,* 27 Fed. Supp. 20.

Harry J. Hollworth, Bankrupt, No. 51026, Referee W. J. Williams, Northern District of Ohio.

John R. Kelly, Bankrupt, No. 81,990, Referee Arthur J. Doran, Southern District, Yonkers Division, New York, April 29, 1943.

Lake Osborn Parrish, Bankrupt, No. 2616, Referee Lillian B. Duff, Northern District, Fort Wayne, Indiana, February 2, 1941.

James Mayers, Bankrupt, Referee F. W. Stelle, Southern District of New York, January 21, 1941.

Roy B. McCarthy, Bankrupt, No. 16169, Referee Henry A. Bundschu, Western District, Western Division, Missouri, July 13, 1940.

Clarence L. McLin, Jr., Bankrupt, No. 993, Referee H. Payne Brezeale, Eastern District of Louisiana, May 22, 1940.

Lora Mefford, Bankrupt, and *Ida May Ostendorf, Bankrupt*, Referee Benno M. Brink, Southern Dist. Central Division, California 1941.

George B. Van Derzee, Bankrupt, No. 73456, Referee Frederick W. Steele, Southern District of New York, February 29, 1940.

William A. Swain and Mary Ellen Swain, Bankrupts (1943) No. 13510, District of Arizona.

James M. Cassidy, Bankrupt, 1944 No. 22203, Referee Saul Berman, District of Connecticut.

Conclusion.

It is respectfully submitted that this case calls for the exercise by this court of its supervisory powers in order that this important question of federal law may be settled and the error of the Circuit Court of Appeals for the Sixth Circuit may be corrected and that, to such end, writ of certiorari should be granted and this court should review the decision of the United States Circuit Court of Appeals for the Sixth Circuit and finally reverse it.

Dated 25th August, 1944.

JACKSON R. COLLINS,
Counsel for Petitioner.